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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1003

ATLANTA PRINTING PRESSMEN & ASSISTANTS UNION NO. 8, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

PETITIONER,

v.

JOHN L. PARKS, D/B/A AMERICAN BOX & PAPER CO.,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN S. McLELLAN,
Minter-McLellan Building
Kingsport, Tennessee

HERBERT S. THATCHER,
431 Tower Building
Washington 5, D. C.
Attorneys for Petitioners

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 15, 1957.

OPINIONS BELOW

The Opinion of the District Court is not officially reported but is unofficially reported at 38 LRRM 2531 and is reprinted as Appendix A hereto. The Opinion of the Court of Appeals is reprinted as Appendix B hereto and is reported at ——F. 2d ——.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1957.

The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

QUESTION PRESENTED

Whether Section 303(a)(3) of the Labor-Management Relations Act of 1947, which makes strikes for recognition unlawful "if another labor organization has been certified," operates to make unlawful a strike for recognition conducted by a union 19 months after a certification and after the certified union had abandoned its status as the bargaining representative for the employees involved.

STATUTES INVOLVED

Section 303 (a) (3) Labor Management Relations Act, 1947, 29 U.S.C.A. Sec. 187, provides, insofar as relevant, as follows:

> "(a) It shall be unlawful, for the purposes of this section only * * * for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is—
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> * * * * * * * * * * *
>
> "(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees * * *
>
> * * * * * * * * * * *
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsec-

tion (a) of this section may sue therefor in any district court of the United States * * *."

Section 13 of the Act provides as follows:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, . . ."

STATEMENT

Petitioner, Atlanta Printing Pressmen & Assistants' Union No. 8, International Printing Pressmen & Assistants' Union of North America, AFL-CIO, is a local labor organization representing employees in the Graphic Arts Industry for collective bargaining purposes in and around Atlanta, Georgia. Respondent is engaged in the printing business in Atlanta, Georgia. In August, 1953, following an election conducted by the National Labor Relations Board, Local 51, Amalgamated Lithographers of America, was certified by the National Labor Relations Board as the collective bargaining representative for Respondent's lithographic department employees then numbering 7 (R. 17). In February, 1955, Petitioner sought recognition from Respondent in a unit composed of all of Respondent's printing employees (including those in the lithographic department) numbering in all 27 (R. 17), and struck for such recognition on April 13, 1955 (R. 3). At that time it represented a majority in the lithographic department (R. 21).

Respondent filed a complaint for damages in the United States District Court for the Northern District of Georgia, Atlanta Division, on May 5, 1955, alleging that Petitioner's strike was violative of Section 303(a)(3) of the Labor-Management Relations Act, 1947 (29 U.S.C.A. Sec. 187), since Local 51, Amalgamated Lithographers of America, CIO, had pre-

viously been certified as the collective bargaining representative for seven of the employees with respect to which Petitioner had struck for recognition. At no time did Respondent attempt to utilize the remedies available to it under Section 8(b)(4)(C) of the Act (the counterpart of Section 303 (a) (3)) by filing charges with the National Labor Relations Board. The District Court treated Petitioner's Motion to Dismiss, supported by affidavits, as a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

The record before the District Court disclosed the following with respect to the status of the certified union at the time of the strike: Although certified in August, 1953, it had never bargained with Respondent, except for a wage increase during the latter part of 1953 (R. 16), and such increase was given only to some of the employees in the unit for the purpose of "getting the union off his back" (R. 20); the certified union and Respondent had never contracted (R. 16); no attempt was made by the certified union to bargain or even represent for grievance adjustments after 1953 (R. 15); of the seven employees in the unit at the time of the certification all had either quit their employment or gone on strike with Petitioner (R. 16, 20, 21). Accordingly, the District Court below found that "defendant's rival union had ceased to represent plaintiff's employees at the time this strike was called, more than a year after its certification had elapsed, and no wage agreement was in existence. There is therefore no issue of fact as to defendant union's good faith in considering that it was not seeking to take recognition away from another union previously certified." (R.

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[1] Dismissal of Respondent's suit following the filing of a second motion for reconsideration by Petitioner, the District Court having originally rendered a judgment in favor of Respondent on the issue of liability (R. 29).

54) The District Court entered an order dismissing Respondent's action (R. 55).[1]

Upon appeal, the Court of Appeals reversed the District Court on the theory that the certification originally issued to Local 51, Amalgamated Lithographers of America, by the National Labor Relations Board was decisive of Petitioner's liability, notwithstanding the certified union's abandonment of its posture as bargaining representative for such employees.

REASONS FOR GRANTING THE WRIT

1. This Petition presents the very important question under the Labor-Management Relations Act of 1947 of the effect of a National Labor Relations Board certification as a bar to a strike for recognition in the not unusual situation where, more than a year following certification, the certified union has abandoned its status as bargaining representative. The Court below held that once a certification was issued by the National Labor Relations Board to one union, such certification in itself was sufficient to preclude a recognition strike for an apparently indefinite period in the future and to impose liability upon another and striking union under Section 303(a) (3). That Court branded as irrelevant the defense of Petitioner which demonstrated the unqualified defunctness of the certified union insofar as employees of the Respondent were concerned. The Court below held Petitioner could not strike under such circumstances in spite of the command of Section 13 of the Act, that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . ." We suggest that a proper reading both of Section 303(a)(3) in itself and of the statute as a whole would produce a construction of the Act directly opposed to that given by the Court below.

The literal language of the Act renders unlawful a recognition strike "if another labor organization has been certified," as a representative of the employees in whose behalf the striking union seeks to exact recognition. But the statute is silent with respect to the duration of the certification entitled to the protection of Section 303 (a) (3). This Court has held that the effectiveness of a certification "is a matter appropriately determined by the Board's administrative authority." *Brooks vs. NLRB,* 348 U. S. 96.[2]

Since the Act nowhere places a time limitation upon the duration of a certification, but rather leaves this matter to "the Board's administrative authority," such legislative omission requires resort to the history of the measure for the purpose of determining Congressional intent; in view of this omission, it cannot be said that this statute is so plain and unambiguous as to leave no room for construction. And this is particularly so where a literal construction of Sec. 303 would lead to a grossly absurd result, or to a result destructive of a fundamental right given specific protection in another section of the Act. *Burnett vs. Moore Cotton Mills Co.,* 49 F. 2d 59. In such circumstances "possible doubts as to the proper construction of the language used should be resolved in the light of its administrative and legislative history." *McCaughn vs.*

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[2] In so doing this Court approved current Board doctrine holding that "after the first year of the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the Union, *the presumption is at that point rebuttable even in the absence of unusual circumstances.*" *Celanese Corp. of America,* 95 NLRB 664. Thus the validity of the certicate previously issued to the certified union in the case at bar was rebuttable at the time of the recognition strike herein.

Hershey Chocolate Co., 51 S. Ct. 510, 512; 283 U.S. 488, 492.

Examination of that history establishes that Section 303 (a) (3) was drafted solely to protect an employer from a recognition strike by one union *where it was under a legal duty to recognize another.* This conclusion finds solid support in House Conference Report No. 510 on H. R. 3020, issued in connection with the consideration of Section 303, in which it is stated that what Congress intended to outlaw were *"strikes and boycotts having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union."* Senator Robert A. Taft, a proponent of the instant legislation, related his view that the enactment of Sec. 303 was consistent with legislation suggested in the President's State of the Union message, pointing out that the President had recommended legislation which would render it unlawful *"for a union to strike to compel an employer to violate the National Labor Relations Act."* Congressional Record, Senate, May 9, 1947, page 5060.[3] The strike in the case at bar would not require Respondent to disregard an obligation to recognize and bargain with the certified union, since it had no obligation to the certified union here. For the record discloses that the certified union had lost each and every adherent in the Respondent's plant at the time of the strike and at that time it did not even pretend to be

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[3] See also Senate Report No. 105, 80th Congress, First Session 93 Daily Congressional Record 7688.

[4] R. 15, 16, 20, 21 and Trial Court's findings of fact to this effect at R. 54, 55.

the collective bargaining representative of any of Respondent's employees.[4] *Cf. Kennedy v. Warehouse and Distribution Workers Union Local 688,* (U.S.D.C. Mo.) decided Jan. 27, 1956, and unofficially reported at 37 LRRM 2496, Opinion reproduced at R. 38, *et seq.*

The construction of the Act reached by the Court below is clearly contrary to the intent and purpose of this statute as derived from a consideration of its legislative history. For example, under the holding of the Court below that the "decisive thing is a certification by the Board," a certification issued by the Board to one union in 1938 would operate to impose liability on another union striking for recognition in 1956, even though the certified union became non-existent in 1939. It cannot be said, as did the Court below, that Section 303 must be construed literally if such construction would produce this grossly absurd result; construction of the Act must yield to reasonable intent as ascertained by reference to the Act's administrative and legislative history. For it is well settled that laws are to be given sensible construction and literal application avoided, if it leads to absurd consequences and if reasonable application is consistent with legislative purpose. *U. S.* vs. *Katz,* 46 S. Ct. 513, 271 U.S. 354. The holding below does violence to the foregoing principles and is patently in the teeth of Congressional purpose in enacting Section 303(a)(3), as well as its purpose in enacting Section 13 of the Act preserving the right to strike. See *NLRB* v. *International Rice Milling Co.,* 341 U.S. 665. Furthermore, the decision of the Court below in giving all but perpetual effect to a certification is opposed to what appears to be Congressional intent that no conclusive

effect be given elections (and presumably consequent certifications) beyond a twelve-month period, as evidenced by the requirement of Section 9(c)(3) that "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

2. Review by this Court of the decision below is further necessary in order to resolve a direct conflict between the construction put upon Section 8(b)(4)(C) of the Act—the counterpart of Section 303(a)(3)—by the National Labor Relations Board, and that put upon Section 303(a)(3) by the Court below; indeed, the decision of the Court below is in conflict with that of several District Courts in other Circuits and is contrary to the rationale of the decision of this Court in *Brooks* v. *NLRB*, 348 U.S. 96, as well as of the decision of the Court of Appeals for the District of Columbia in the case of *Bonnaz* v. *NLRB*, 230 F. 2d 47. The decision of the Court below results in the anomalous situation of permitting an employer to sue directly in the District Courts under Section 303 of the Act for Damages caused by alleged illegal strikes for recognition in the face of defunct certifications, while at the same time the National Labor Relations Board would refuse to provide that employer any relief under Section 8(b) (4) (C) or Section 10 of the Act by way of injunction or otherwise, and the same activities which are held by the Board not to constitute violations of one section of the Act have been held by the Court below to violate another identical section.

The administrative construction heretofore placed upon Section 8(b)(4)(C) of the Act by the National Labor Relations Board would appear all but controlling in construing Section 303(a)(3), particularly in view of this Court's determination in *Brooks* v. *NLRB*, *supra*, that the National Labor Relations Board has

the administrative authority to determine the effectiveness of a certification issued by it. The Board has determined that under the circumstances here present a certification would not operate to bar a recognition strike, and for that reason Respondent did not even attempt to pursue his remedy under Section 8(b)(4)(C) of the Act. Yet the Court below has entirely ignored the Board's administrative interpretation of the effectiveness of a Board certification.

Section 8(b)(4)(C) condemns as an unfair labor practice in identical terms the precise conduct rendered unlawful by Section 303(a)(3). Accordingly, these two statutes have been correctly described as parallel provisions. "Section 8(b)(4)(C) is intended to achieve and lead to administrative sanctions. Whereas its counterpart Section 303(a)(3) provides private redress to an employer by way of damages from labor organizations responsible for those unfair labor practices condemned in Section 8(b)(4)(C)." *Pepper and Potter, Inc.*, v. *Local 977, United Auto Workers*, 103 F. Supp. 684, 687. Hence, conduct violative of Section 8(b)(4)(C) results in liability under Section 303(a)(3). Therefore, determinations construing such two sections of the Act may be utilized interchangeably with validity. The Labor-Management Relations Act, 1947, by virtue of Section 3(b) thereof created a General Counsel of the Board with final authority on behalf of the Board "in respect to the investigation of charges and issuance of complaints under Section 10 and in respect to the prosecution of such complaints . . ." Furthermore, it must be noted that it is the Board, and the Board alone, which has authority to and which in fact does grant certifications to labor organizations which achieve bargaining rights under Section 9; presumably, the Board's determinations respecting the effectiveness of its certifications

must therefore, under the Act, be considered conclusive. Specifically, the General Counsel of the N.L.R.B. has ruled on at least two reported occasions that a strike in the circumstances of this case would not warrant proceedings against the striking union under Section 8(b)(4)(C). Such administrative determinations are as follows:

> "Strike by uncertified union for recognition and bargaining as representation of separate unit ceded by certified union is lawful where (1) certification is more than one year old, (2) no union contract is in force, (3) certified union has ceded jurisdiction over employees in separate unit and disclaims any right to represent them, and (4) uncertified union has signed up majority of employees in separate unit and is demanding exclusive representation." Administrative Decision of NLRB General Counsel, (1952) Case No. 539. 2 CCH Labor Law Reporter 5759, Sec. 52.

> "Strike called and supervised by union formerly recognized but not certified at time of strike is lawful despite fact that another union had been certified, where 40 of 47 employees in unit supported striking union, since under these facts, normal presumption of continued status of certified union could not be made." Administrative decision of NLRB General Counsel (1951) Case No. 181. 2 CCH Labor Law Reporter 5759, Sec. 34.

The foregoing rulings of the General Counsel are entirely consistent with the remarkably clear legislative history of this statute and stand as authority for our view that the strict and harsh construction placed

thereon by the Court below is both unwarranted and erroneous. Consistent with the foregoing, the Board has consistently refused to issue complaints based on charges that activities similar to those of Petitioner herein have violated Section 8(b)(4)(C) of the Act.

3. Even applying the literal language of Sec. 303 (a)(3) to the factual situation presented by this record, that section is inapplicable for the reason that one of its major elements is not present. For the conclusion reached below that the historical fact of a Board certificate once issued will forever operate to bar a recognition strike by other than the certified union, regardless of the nonexistence of the certified union is hostile to the statutory requirement that there be "another labor organization [which] has been certified as the representative of such employees." In the instant action it can be fairly said that insofar as the employees of the Respondent were concerned, there did not exist "another labor organization." The certified union had long ceased to function and did not even hold itself out as "the representative of such employees." Accordingly, the naked certificate of the Board was a fiction insofar as Respondent's employees were concerned. In *Bonnaz* vs. *NLRB*, 230 F. 2d 47, the Court of Appeals for the District of Columbia held that the fact that a Board certification was outstanding did not render a recognition strike violative of 8(b)(4)(C), since the individual certified by the Board in that case as the collective bargaining representative was not a "labor organization" within the definition of Section 25 of the Act despite the fact of the Board's certificate. The rationale of the *Bonnaz* decision is plainly at variance with the holding below, which limited its liability inquiry to the certificate alone, specifically holding that "the decisive thing is the certification by the Board." Further, it cannot be

said here that the certified union "exists for the purpose" of dealing with the Respondent with respect to collective bargaining matters under a record which fails to disclose any effort by the certified union to so function "since the latter part of 1953" (R. 15). It would appear reasonable to assume that in employing the language ". . . another labor organization which has been certified . . ." Congress intended to describe an existing rather than a defunct or non-existent labor organization. Under an application of the literal language test, we submit that the sweeping construction placed upon Section 303(a)(3) by the Court below is both unreasonable and erroneous, proceeding as it does on the premise that liability under this section may be determined in a vacuum and without reference to reality.

The Court below predicates its conclusion respecting the meaning of Section 303(a)(3) principally on the argument that there were other remedies available to Petitioner under the Act, particularly under Section 9(e) thereof, which would have obviated any necessity for a strike. But to say, as does the Court below, that there was a convenient and available machinery to Petitioner for decertification or representation proceedings under the Act, overlooks the permissive nature of such processes and the mandate of Section 13 of the Act specifically securing the right to strike, except as expressly prohibited by the Act. For implicit in the Court's reasoning is the view that the decertification processes of the Board are mandatory rather than permissive, and that a union resorts to self-aid at its peril. This notion is contrary to the decision of this Court in *U.M.W. v. Arkansas Oak Flooring Co.*, 351 U.S. 62, which makes it plain that a union by failing to elect to utlize Board processes

does not thereby forfeit its rights under Sections 13 and 7 of the Act. To impose a contrary requirement, as did the Court below by implication, is judicial legislation of the most obvious sort.

Nor are the policies or purposes of the Act effectuated by the decision below. While a primary objective of Section 303 (a)(3) is the achievement of industrial stability by affording protection for established certified collective bargaining relationships, it cannot be said that this purpose is served when the certified union becomes defunct or ceases to exist. And most certainly Congress by the enactment of Section 303 did not intend to create a device by means of which an employer would be perpetually protected from a recognition strike by one labor organization simply because at some time in the past another had been certified, even though changing times and circumstances had rendered the certified union defunct or non-existent.[8] Under legislation which seeks to achieve industrial stability by fostering and promoting the right of collective bargaining, and to this end expressly secures the rights of employees to engage in concerted activities for the purposes of mutual aid or protection, including the right to strike, a determination which forecloses the exercise of these rights in the circumstances presented by this record, is as antithetical to the statutory aim of stability as day is to night. For it bars the right to establish a collective bargaining

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[8] *Tungsten Mining Corp v. District 50, United Mine Workers of America*, ...F. 2d ....., unofficially reported at 39 LRRM 2460, relied on by the Court of Appeals is clearly distinguishable, and indeed the Fourth Circuit limited its decision to "the facts of this particular case" and, after discussing the District Court decision herein, pointed out that in Tungsten there was "an element . . . distinguishing it from any that have been called to our attention or disclosed by our own research."

relationship on the pretext that an abandoned certificate to another labor organization is to be equated with a live certificate to a functioning labor organization in determining liability under Section 303 (a) (3).

4. The instant case presents an issue of prime importance in the administration of the National Labor Relations Act, as amended, and review by this Court is necessary if consistency is to be achieved between the Board's interpretation of the effect of the certifications which it issues under Section 9 of the Act and the effect given such certifications by the courts when Section 303 of the Act is invoked. The issue is one of substance which has not been, but should be, decided by this Court, to the end that rights and liabilities of labor organizations under this important statute are known and understood. We believe that the considerations herinabove set forth call for the exercise by this Court of its review powers to the end that confusion created by the decision of the Court below be resolved.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

JOHN S. MCLELLAN,
Minter-McLellan Building,
Kingsport, Tennessee.

HERBERT S. THATCHER,
431 Tower Building,
Washington 5, D. C.
Attorneys for Petitioner.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION No. 5183.

JOHN L. PARKS, d/b/a AMERICAN BOX & PAPER COMPANY

VS.

ATLANTA PRINTING PRESSMEN & ASSISTANTS UNION No. 8, INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS UNION OF NORTH AMERICA, A. F. OF L.

AMENDED ORDER GRANTING DEFENDANTS' MOTION TO DISMISS.

STATEMENT OF THE CASE.

Plaintiff John L. Parks of Atlanta, doing business as American Box & Paper Company, brought this action against Atlanta Printing Pressmen & Assistants Union No. 8, International Printing Pressmen and Assistants Union of North America, A. F. of L., hereinafter referred to as defendant and as Local No. 8. He seeks to recover damages to his business because of a strike of certain of his employees called by the defendant labor union in its efforts to obtain recognition, and allegedly in violation of the provisions of *Section 303(b) of the Labor Management Relations Act of 1947, as amended* (see *Title 29 U.S.C.A., Sec. 187*).

At the time of the strike the defendant union was seeking recognition by plaintiff of itself as the bargaining representative of certain employees, notwithstanding the fact that a rival union (Local No. 51 Amalgamated Lithographic Workers of America, C.I.O.,) had been certified more than a year before by the National Labor Relations Board as the exclusive agent of such employees, and had never been decertified by action of the National Labor Relations Board.

The vital question raised by the motion to dismiss is this, whether the defendant local union at the time of calling the strike could, even in good faith, legally assume to decide for itself that the rival union (certified over a year previously) was not then in fact the bargaining representative of such employees, without first obtaining an adjudication of that fact from the Labor Board.

There can be no doubt from the record in this case that at the time of the strike and for some months prior thereto, Local No. 51 had been quite inactive. There had existed no labor agreement for the years 1953, 1954 or 1955; no grievances of employees had been processed and, while a wage increase was negotiated by this rival union during 1953, it had not since that date attempted to bargain with the company. While at the date of certification there were seven employees working in the unit, none of them at the time of the strike were employed by plaintiff, they having quit work before the strike or having gone out on the current strike. In short Local No. 51 at the time of the strike, did not in fact represent a majority of the employees and defendant union was authorized to so believe, unless the outstanding certification more than a year old, required it to find otherwise.

Plaintiff earnestly insists that, whatever may have been the apparent justification for calling the strike, it must be declared illegal, having been called in the face of a certification of a rival union more than a year old and never formally set aside.

This case involved the construction of the amendment to the National Labor Relations Act adopted in 1947, being Section 9(c) of said Act (see 29 U.S.C.A., §187(a)(3), reading as follows:

> "It shall be unlawful, . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment, to use . . . or otherwise handle or work on any goods . . . or to perform any services, where an object thereof is . . . (3) forcing or re-

quiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of §159 of this title."

It is further provided that anyone injured by a violation of the aforesaid may recover damages.

Section 159 above referred to provides that whenever a petition shall be filed to the Board by a group of employees seeking recognition "no election shall be directed in any bargaining unit or any sub-division within which in the preceding twelve months period, a valid election shall have been held." See *29 U.S.C.A., §159(c)(3).*

By construing together the above quoted portions of *Section 187* and *159* it appears that the rival union had no right to petition for recognition within one year after the election which favored the other union, and thus a difficult question arises as to whether the defendant union in this case was justified in calling the strike for recognition, more than a year after the other election, without obtaining a certification by the National Labor Relations Board of its status.

Apparently the defendant local union was at first of the opinion that its proper procedure to obtain recognition was to petition the National Labor Relations Board for recognition, and it did so, but subsequently withdrew the same without prejudice and then within two months called the strike.

Whatever may be the rulings of other circuit courts of appeal on this question, it seems to be settled in the Fifth Circuit in favor of the defendant union in this case by the decision in the case of *National Labor Relations Board* vs. *International Furniture Company, 212 F.2nd 431.* There the court in part said as follows:

"While there is a presumption that the majority status of the union continues after the year of certification, the employer has a right to refuse recognition after the year has passed where the

refusal arises from a belief in good faith that the union does not represent a majority of the employees." *See p. 433.*

In like manner, the rival union (defendant in this case) cannot be held liable for calling an unlawful strike in view of the fact that the union previously recognized had, at the time of this strike, ceased to represent a majority of the employees, as clearly shown by the stipulation of facts upon which this case was tried.

The above ruling is consistent with a position now taken by the National Labor Relations Board as evidenced by its ruling in the case of *Celanese Corporation of America, et al,* decided July 27, 1951, reported in *Vol. 95, Decisions of National Labor Relations Board, page 664, beginning on page 668.* At page 672 the Board stated as follows:

> "After the first year of the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the union, the presumption is at that point rebuttable even in the absence of unusual circumstances."

The above construction of this Act by the Board was expressly approved by language of the United States Supreme Court in the case of *Brooks* vs. *National Labor Relations Board, 348 U.S. 96.* The Court stated in part:

> "The Board has ruled that one year after certification the employer can ask for an election, or if he has fair doubts about the union's continuing majority, he may refuse to bargain with it. This too is a matter appropriately determined by the Board's administrative authority."

While the foregoing language was not necessary to be used in the determination of the case under consideration, it nevertheless represents the unanimous opinion by that court.

The ruling herein made is also consistent with ruling by the District Court of the Eastern District of Missouri in the case of *Kennedy* vs. *Warehouse Workers*

Union, decided January 27, 1956, to the effect that injunction should not issue restraining a strike for recognition where the certified union after a year had lost the support of a majority of employees.

The plaintiff in this case relies largely upon decision by the Fifth Circuit in the case of *National Labor Relations Board* vs. *Sanson Hosiery Mills, Inc., 195 F.2d 350,* and this Court was heretofore of the opinion that that case was controlling in behalf of the plaintiff in the instant case. There is much language in the Sanson case leading one to believe that the certification must be respected, even after a year has passed. The Board said in part:

> "The existing certification must nevertheless be honored until lawfully rescinded." (See page 352).

However, in that case it appears that the certification in question was less than two years old, and at that time the Board, acting within its statutory authority, would not call a new election during the two-year period. The Court points out that the amendment approved October 22, 1951 to Section 9 of the Act did not control the decision in the case, and therefore, the decision in that case would not be controlling on a controversy which arose under the present Act more than one year after certification.

Under the facts stipulated to be true by the parties in this record, defendant's rival union had ceased to represent plaintiff's employees at the time this strike was called, more than a year after its certification had elapsed, and no wage agreement was in existence. There is therefore no issue of fact as to defendant union's good faith in considering that it was not seeking to take recognition away from another union previously certified.

Defendant's motion to strike the complaint, supported by stipulations of fact, will be considered as a motion for summary judgment and it is hereby sus-

tained and the action is dismissed with costs on plaintiff.

This the 26th day of June, 1956.

s/FRANK A. HOOPER,
United States District Judge.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 16257

JOHN L. PARKS, d/b/a AMERICAN BOX AND PAPER COMPANY,

APPELLANT,

VERSUS

ATLANTA PRINTING PRESSMEN AND ASSISTANT'S UNION No. 8, INTERNATIONAL PRINTING PRESSMEN AND ASSISTANT'S UNION OF NORTH AMERICA, A.F.L.,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(April 5, 1957.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

BROWN, Circuit Judge: In 1953 the National Labor Relations Board, after an election Section 9(c)(1)(A), 29 USCA 159(c)(1)(A), certified that the specified CIO local was the exclusive bargaining agent for the identified unit[1] of the Employer's printing plant. On April 13, 1955, the defendant AFL Union, with no certification as representative of these or any other employees of this plant, struck the Employer's plant to force recognition.

A plain, literal violation both of Section 303(a)(3) and (b) authorizing recovery of damages by an employer[2] and Section 8(b)(4)(c), subjecting an offend-

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[1] The unit was composed of "all lithographic department employees, including camera men, layout men, plate makers, lithographic pressmen, and their apprentices and helpers, and the artists employed at employer's plant in Atlanta, Georgia, excluding all other employees and supervisors as defined in the Act."

[2] 29 USCA 187:

ing labor organization to administrative sanctions of the Board for an Unfair Labor practice [3] was nonetheless declared to be permissible because the certified union, while certified, had not actively functioned as the bargaining representative for the unit and no longer in fact represented a majority of the unit members.[4] After some vacillation the District Court, treating pleadings, affidavits and stipulations and motions to dismiss and for judgment as motions for summary judgment, FRCP 56 and 12(c), denied the motion of the plaintiff employer and granted that of the defendant AFL union to dismiss the employer's suit for damages.

The certification, originally issued, is still outstanding and has never been cancelled, and no other labor organization has been certified for the employees in the specified unit. In February 1955 the rival AFL union filed a Petition for Election and Certification

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"(a) It shall be unlawful, * * * for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services, where an object thereof is—

* * * * *

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

* * * * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States * * * and shall recover the damages by him sustained * * *."

[3] 29 USCA 158:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services, where an object thereof is:

* * * * *

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;"

with the Regional Director of the Board to represent employees in a broader unit which would comprise 27 persons and include crafts in addition to those in the original certified unit. The Employer declined to recognize, meet or negotiate with the AFL union. At 10:00 a.m. April 13, 1955, the AFL Union delivered an ultimatum that negotiations commence at 12:00 noon, or the employees would strike. The Employer refused and the plant was struck. Two weeks later, April 27, 1955, the AFL Union formally requested, and the Regional Director granted, withdrawal of the previous request for an election of a new bargaining representative.

The Employer insists that with such simple, plain words, " * * * if another labor organization has been certified as the representative of such employees under the provisions of section 159 * * *," there is no room for reading into the Act, as would the raiding rival union, words requiring not only certification but that the certified union then currently represents a majority of the employees.

In the defendant union's approach, current majority status is decisive for, it argues, the Act protects the employer from the coercive pressures from a raiding union only if such employer, in an administrative Board proceedings, could have been compelled to bargain with the certified union. If, from an absence of a majority status, the employer could not have been found guilty of an unfair labor practice at the complaint of the certified union then pressures from the outside union are permissible since they do not seek to compel action by the Employer *in disregard of his obligations* to deal with the certified union. The result is

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[4] It was undisputed that: seven men comprised the unit in 1953. No formal contract was obtained, but the certified union did secure a raise for the unit employees in late 1953. No demand by it for formal bargaining was made in 1954 or 1955, nor were any shop steward, grievance machinery or similar procedures installed. Apparently there was mutual inactivity in formal bargaining. At the time of the strike, April 13, 1955, there were five men working in the certified unit, two of whom, originally members of the CIO union, became members of the rival AFL union shortly before the strike.

that, following this approach, the application and meaning of words purposefully and recently put into the Act proscribing conduct by *labor unions*, as such, is to be measured and tested by routine application of the terms of Section 8(a)(5) which expressly applies only to *employers*,[5] not employees.

We reject any such narrow interpretation and construction as out of step with the plainly revealed Congressional purpose.

At the outset it is significant that Congress in Section 8(b) (4) and 303(a)(3) did not, as it might, speak in terms of a labor organization "designated or selected by a majority of the employees" or "then representing a majority of the employees", or one with whom the "employer is by law required to bargain collectively." Such descriptive standards, though capable of tangible delineation, would unavoidably present substantial questions of fact in application. This difficulty was eliminated altogether by using the precise standard of a union which has been "certified as the representative of such employees under the provisions of section 9 of the * * * Act." Legislative significance of the status as a "certified union" is, of course, acknowledged by the defendant union for it recognizes, as it must, that during the twelve months period subsequent to a post-election certification, the status as a *certified* union is alone decisive. *Brooks v. N.L.R.B.*, 348 U.S. 96, 99 L.Ed. 125.

Referring, as it did, to certifications under Section 9, Congress must have intended to include not only the fact of initial certification but the statutory process of altering or terminating a certification. This, of course, specifically covers the exact situation where it is claimed that a certified union no longer represents a majority.[6]

Thus, this is not a case in which by judicial action we must fill an inadvertent legislative void. For here ma-

[5] Section 8(a)(5), 29 USCA 158(a)(5):
"(a) It shall be an unfair labor practice for an employer— * * *
"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

chinery is prescribed which fully meets initial and changing needs. Wherever and whenever, the policies of the Act would be infringed, thwarted, or impeded by continued recognition of a prior certification, a ready and workable means is at hand to rescind it. That machinery is simple and available and assures that if, as will generally be the case, there is dispute and controversy over the necessity and desirability of decertification and change, the facts can be surveyed and determined by the Board as a disinterested tribunal.

The criticism that the administrative discretion lodged in the Board in determining after an appropriate hearing that such "a question of representation exists" might result in a denial of an outside union's request proves, we think, the wisdom of our holding. If, on that hypothesis, the facts to the Board do not reasonably require decertification or an election to determine it, why should an employer under the pressures of a strike and threatened stoppage of its business operations, be compelled to submit to a demand which an impartial tribunal has thought unfounded?

Indeed, pursuing this analysis of the predicament of the Employer, demonstrates that Congress had definite purposes in mind in describing the union as "certified."

Underlying Sections 8(b)(4) and 303 (a)(3) is Congressional recognition that industrial peace and stability was not being achieved, that chaos and unrest frequently arose, where employers were put in the posi-

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* Section 9(c)(1), 29 USCA 159(c)(1):

"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or a group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees * * * (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a); * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

tion of making a hard choice between rival forces, whether the competition was between certified and uncertified unions, between different crafts in jurisdictional disputes, or between a union and some other employer. A mere attitude of neutrality by the employer was neither sufficient nor helpful, for the success or failure of the controversy between the unions did not depend on one, rather than the other, obtaining the partisan help of the employer. Either way the employer turned, favoring one or the other, the unfavored would strike. And if, as is more likely, the employer stood helplessly by, the strike or the threat of a strike by whichever one was on the "outside" had as its purpose not employer neutrality but, finally employer partisanship—complete and absolute capitulation to the demands of the victor.

Moreover, a rule which would permit or require an employer under pressure of a strike or threatened one to bargain with a rival union claiming a current majority, would compel, as a corollary, a duty by the employer fairly and honestly to investigate and determine the validity of such claim. And in this process what means does the employer have? What may he use? If he interrogates, how is he to do it? Singly or in groups? At what point does a conscientious effort to ascertain the real exact truth about his employees' wishes transcend legitimate inquiry and become the seed for an assertion of employer bias and then shift from rival union to employer the enveloping cloud of a charge of unfair labor practice?[7]

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[7] See, e.g., National Labor Relations Board v. Wagner Iron Works, 7 Cir., 220 F.2d 126 at 139, cert. den. 350 U.S. 981, 100 L.Ed. 850, "Thus, the Board has recently held that an employer may legally interrogate his employees as to their union membership in order to inform himself as to the validity of a union's claim of majority support. Blue Flash Express, Inc., 109 NLRB No. 85. However, as the Board said, the object of interrogation must be within the law and an employer acts at his peril, lest his investigation become tainted and coercive when considered in conjunction with other activities which reveal a departure from strict neutrality." National Labor Relations Board v. Nashua Manufacturing Corporation of Texas, 5 Cir. 218 F.2d 886; National Labor Relations Board v. McGahley et al, 5 Cir., 233 F.2d 406; National Labor Relations Board v. Montgomery Ward & Co., 2 Cir., 192 F.2d 160; National Labor Relations Board v. Coats & Clark, Inc., 5 Cir. .... F.2d .... [No. 16017, February 13, 1957]; National Labor Relations Board v. Fox Manufacturing Company, 5 Cir., 238 F.2d 211; National Labor Relations Board v. The Newton Company, 5 Cir., 236 F.2d 438.

Must the employer take the first answer of interrogated employees, or may, or must, he probe deeper when circumstances indicate, as they easily might, that the apparent defection to the raiding rival is the very result of threats against their security or safety? And if invidious fear permeates the atmosphere, what facilities has the employer to ferret out the facts, obtain evidence, formal or informal, which would measure up to the minimum demands of an objective, trustworthy investigation? What protection, or assurance of it, can he give to reluctant or apprehensive employees? How can he compel those he knows know the truth to reveal what they know he knows they know? Where fear, or apprehension, or stubborn recalcitrance or defiance seal off access to the whole truth, must the employer, frustrated and thwarted in this unsought role of arbiter, nevertheless come to a decision? And through it all how can a dispassionate objective search for truth be made by one who, no matter how conscientious is his purpose fairly to investigate and determine, cannot escape the constant knowledge that, through actual or threatened strike by the raiding group, it is the economic security of his own business which is threatened or at stake?

This and further analysis demonstrates that to argue that because an employer in a complaint proceeding charging an 8(a)(5) unfair labor practice for failure to bargain in good faith, perhaps will not* be compelled ultimately to bargain with the certified un-

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* Brooks v. NLRB, 348 U.S. 96, 104, 99 L.Ed. 125, 134, "The Board has ruled that one year after certification the employer can ask for an election or, if he has fair doubts about the union's continuing majority, he may refuse to bargain with it. This, too, is a matter appropriately determined by the Board's administrative authority." Appended to this text is note 18: "Celanese Corp. of America, 95 NLRB 664. The Board has on several occasions intimated that even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief. Id. 95 NLRB at 674; United States Gypsum Co. 90 NLRB 964, 966-968; see also J. P. O'Neil Lumber Co. 94 NLRB 1299."

NLRB v. International Furniture Co., 5 Cir., 212 F.2d 431, 433; cf. NLRB v. Sanson Hosiery Mills, 5 Cir., 195 F.2d 350, cert. den. 344 U.S. 863, 97 L.Ed. 669; NLRB v. White Construction & Engineering Co., 5 Cir., 204 F.2d 950, distinguishing NLRB v. Aldora Mills, 5 Cir., 197 F.2d 265.

ion which has in fact lost its majority status after the passage of one year, such an employer will not be protected by administrative relief, §8(b) (4) (C), or damages, §303 (a) (3), from a raiding union is "• • • to make situations that are different appear the same." *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 99 L.Ed. 125, 134.

First, if the whole thing is equated with the employer's ultimate obligation to bargain, then the fact of certification in determining availability of the remedies of Sections 8(b) (4) (C) and 303 (a) (3) becomes virtually immaterial after the first year. Next, the very structure of the Act itself shows that where the protected union is one the employer is obligated to recognize and with whom it is required to bargain, very plain words conveying that clear meaning were used.[9] And the principal distinction is again the fundamental difference between determination of the controversy in a deliberative forum with its appeal to a reasoned, impartial consideration of reliable facts as opposed to decision wrought by the unleashing of native jungle forces of sheer economic power with the likelihood, if history is to be our guide, that where spirits are high and feelings deep, economic pressure may soon have physical power as an ally. If in Section 8(a) (5) unfair labor complaint proceeding the employer is ultimately absolved from bargaining with the certified union because it has lost its majority status, the decision is not that hammered out by clashing forces of unreasoning power, but is that of an independent tribunal functioning with adequate machinery established to resolve such very controversies. Adjudication, not self-help, deliberation, not display of pressure, has been the solvent. *Cone Bros. Contracting Co.*

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[9] See, e.g., 8(b)(4)(D), 29 USCA 158 (b)(4)(D): "• • • *Provided*, That nothing contained in this subsection (b) [8(b)] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a *representative* of such employees *whom* such *employer is required to recognize* under this Act;" (Emphasis supplied).

Almost identical language is used in the damage suit sanction of §303(a)(4), 29 USCA 187.

v. *NLRB*, 5 Cir. 235 F.2d 37, cert. den. 352 U.S. 916, 1 L.Ed.2d 122.

We therefore, as does the Fourth Circuit in its recent decision,[10] *Tungsten Mining Corporation* v. *District 50, United Mine Workers of America* [February 12, 1957, 31 CCH Labor Cases No. 7059 at 93356], ...F.2d....., hold that, in the words of the Act, the decisive thing is the certification by the Board. Until by Board action it is effectually extinguished, it has continued vitality to protect an employer against a raiding rival whose objective is "forcing or requiring * * * [such] * * * employer to recognize or bargain with * * * [it] * * * as the representative of his employees * * *."

The Order granting summary judgment for the defendant AFL Union is reversed and rendered for the plaintiff John L. Parks, d/b/a American Box and Paper Company, on the issue of liability and the cause is remanded for further and not inconsistent proceedings.

REVERSED AND RENDERED AND REMANDED.

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[10] This case, reversing the District Court's holding, 142 F.Supp. 800, so heavily pressed by the defendant AFL Union, points up further difficulties of construing "certified" to require certification *plus* a current majority. During the strike the same District Court had, on application of the Regional Director under Section 10(1), 29 USCA 160(1), enjoined the raiding union from striking and picketing to force recognition of District 50 as the representative of employees for which the certified union had been certified. This ended the strike. Subsequently in an administrative proceeding, the National Labor Relations Board held, 106 NLRB 905, that the strike was illegal under Section 8(b)(4)(C) and issued its cease and desist order which, on Enforcement Proceedings, was affirmed, without opinion, by the Fourth Circuit.

If the controversy may be thrashed out by a picket line where does it leave the parties and especially the by-standing employer if, after capitulation under the pressures of a strike, the Board, on substantial evidence determines in accordance with law that the certified union in fact had a current majority status and that the raid was illegal? Where does it leave the Board, indeed the Court of Appeals, whose orders may thus have been rendered lifeless?

Kennedy v. Warehouse and District Workers Union Local 668, 29 CCH Labor Cases #69736 (D.C. Mo.), also much relied upon was a denial of injunction, Section 10(1), 29 USCA 160(1), although subsequently the Board, 116 NLRB 115, on the merits, determined that the strike was unlawful.